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App. No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

SUNRISE VALLEY, LLC; WESTERN ROCK PRODUCT, a dba of STAKER AND PARSON COMPANIES, a Utah corporation,
Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; UNITED STATES OF AMERICA,
Respondents.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the District Court err in refusing to follow this Court's decisions in Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), and BedRoc Ltd. v. United States, 541 U.S. 176 (2004), when it granted the Government's Motion To Dismiss for failure to state a claim when the undisputed facts in the record show that the rock, sand, and gravel on the subject property is not found in a deposit separable from the surface estate, that there was no economic value or market for the rock, sand, and gravel when the patents were issued, and that no one in the area of this land considered rock, sand, and gravel to be "minerals" at the time the patents were issued?

Did the District Court and the Tenth Circuit err in finding Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), as dictating a dismissal of plaintiff's case based solely on their interpretation of the Stock-Raising Homestead Act of 1916 when 5 of the 9 Justices in this Court's BedRoc Ltd. v. United States, 541 U.S. 176 (2004), decision, (the two concurrences and three dissenters) held that the word "valuable" in the Pittman Act was not sufficient to explain the difference in outcome between Western Nuclear and BedRoc, and the four part Western Nuclear test shows this common rock, sand, and gravel was not reserved as a mineral in southwest Utah in 1925 when these patents were issued?

PARTIES TO THE PROCEEDING

Petitioners Sunrise Valley, LLC and Western Rock, a dba of Staker and Parson Companies, a Utah corporation were Plaintiffs/Appellants in this matter.

Respondents Dirk Kempthorne, in his capacity as Secretary of the Interior, Bureau of Land Management, and the United States of America were the Defendants/Appellees in this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Petitioner Western Rock Product is a "dba" of Staker and Parson Companies. The Staker and Parson Companies are a wholly owned subsidiary of Oldcastle Materials, Inc.

There is no parent company or publicly held company owning 10% or more of Petitioner Sunrise Valley, LLC's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sunrise Valley, LLC and Western Rock, a dba of Staker and Parson Companies, a Utah corporation, respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit which affirmed the Trial Court's dismissal of Petitioners' claims as failing to state a claim upon which relief could be granted.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit (Appendix 9a-24a) was issued on May 20, 2008, and is available at 528 F.3d 1251 (10th Cir. 2008). The Tenth Circuit's order denying rehearing and rehearing *en banc* is unreported (App. 25a).

The original decision of the United States District Court for the District of Utah, Central District (App. 2a-8a) was issued on June 20, 2006, and is available at 2006 WL 1720734 (D. Utah).

STATEMENT OF JURISDICTION

This is an action for violation of the Fifth Amendment of the United States Constitution. It is also a quiet title action pursuant to 28 U.S.C. § 2409a. The Utah District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The Utah District Court's decision granting Defendants' Motion to Dismiss was entered on June 21, 2006. (App. 2a-8a). Plaintiffs' Notice of Appeal was filed on August 8, 2006. The Tenth Circuit Court of Appeals decision affirming the Trial Court's decision was entered on May 20, 2008. (App. 9a-24a). On July 22, 2008, the Tenth Circuit Court of Appeals issued an Order denying Petitioners' Petition for Rehearing and Rehearing *En Banc*. (App. 25a).

STATUTORY PROVISION INVOLVED

The Pittman Underground Water Act of 1919 ("Pittman Act"), Ch. 77, 41 Stat. 293. (App. 26a-31a).

The Stock-Raising Homestead Act of 1916 ("SRHA"), 43 U.S.C. §§ 291-302. (App. 32a-38a).

STATEMENT OF THE CASE

According to the lower courts, those who settled the Nevada desert obtained title to the sand and gravel that made up the surface estate they were settling, but those who settled Petitioners' ground, just 50 miles to the east, in the southern Utah desert, settled fifteen years earlier, did not. The lower courts refused to analyze the facts that showed that no one considered sand and gravel a "mineral," at the time the title to the property was transferred. Instead, the courts held that Petitioners' title was the same as that obtained by settlers in Wyoming which, not until long after settlement, was discovered to have an alluvial deposit of commercially valuable sand and gravel. The lower courts' reasoning is both irrational and disruptive to real estate ownership rights that this Court has traditionally counseled need to be determinate and determinable.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

In this case, the lower courts trampled not only Petitioners' ownership and right to control their real property but also the precedents of this Court. There is perhaps no more important bulwark a citizen of our nation enjoys against arbitrary government than the right to rely on long established real property rights.

An attempt was made by the Government and the Tenth Circuit Court of Appeals to reconcile this Court's BedRoc Ltd. v. United States, 541 U.S. 176 (2004) and Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983) decisions through the BedRoc plurality's reference to the adjective "valuable" which modifies "minerals" in the Pittman Underground Water Act of 1919 ("Pittman Act"), ch. 77, 41 Stat. 293, while the word "valuable" does not modify "minerals" in the Stock-Raising Homestead Act of 1916 ("SRHA").

The problem with this facile attempt at distinguishing the two cases is that five of the nine Justices from this Court who addressed the issue in BedRoc rejected the idea that the word "valuable" was an intellectually satisfying distinction. See, concurring opinion of Justice Thomas, with whom Justice Breyer joined, BedRoc, 541 U.S at 187-88, and the dissenting opinion of Justice Stevens, with whom Justices Souter and Ginsburg joined, Id. at 191. If the reason given by the panel for distinguishing BedRoc from Western Nuclear has been wrestled with and rejected by a majority of the members of this Court, then analysis must go deeper. An intellectually satisfying method of reconciling the two cases must be derived so that public confidence in the legal system can be preserved.

It is especially important in this area of real property rights that the Court's determinations not appear to be arbitrary. See, Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979). It is this disciplined approach to interpretation of the law that makes us a nation of laws rather than a nation

governed by the private views of the men or women sitting on the bench.

Equally important is the notion that what a citizen owns, after making the sacrifices required to patent the ground, does not change with the shifting economy of the nation. Thus, the courts have consistently held that the determination of what was conveyed with a patent or deed has to focus on the time of the patent in deciding what was reserved and what was not. Reference to the date of conveyance also reflects the fundamental tenet of property law that the scope of a conveyance is ascertained at the instant of a conveyance. See, City of Kellogg v. Mission Mountain Interests Ltd., Co., 16 P.3d 915, 919 (Idaho 2000); Red Hill Outing Club v. Hammond, 722 A.2d 501, 504 (N.H. 1998); Hare v. McClellan, 662 A.2d 1242, 1249-50 (Conn. 1995); Crockett v. McKenzie, 867 P.2d 463, 465 (Okla. 1994); Herbert T. Tiffany, Real Property § 977 (3d ed. 1975). See also, Poverty Flats Land & Cattle Co. v. United States, 788 F.2d 676, 683 (10th Cir. 1986)("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions."); Miller Land & Mineral Co. v. State Highway Comm'n of Wyo., 757 P.2d 1001, 1007 (Wyo. 1988)("value must be determined as of the time of the grant, reservation or exception")(Rooney, J., concurring).

"It is beyond dispute that when the Pittman Act [the statute construed in BedRoc] became law in 1919 [just six years before the patents issued in this

case], common sand and gravel could not constitute a locatable 'valuable mineral deposit' under the General Mining Act...[t]hus in the unlikely event that some ambitious prospector had sought a patent from the United States in 1919 to extract sand and gravel from Pittman Act lands, the Secretary of the Interior would have flatly refused him." BedRoc, 541 U.S. at 185-86. A similar notion of fairness requires the focus to be on the ground the settler was homesteading and whether he and Congress intended to exclude a portion of his property from what Congress intended as a fee title.[1]

Had the Tenth Circuit analyzed the patents issued in this case and the intents of the parties at the time the patents were issued, rather than simply concluding that any patent issued under the SRHA included a reservation of sand and gravel no matter to what land it pertained and no matter at what time the patents were entered into, it would, no doubt, have ruled in favor of the landowners in this case. Cases from other courts that have interpreted patents after Bedroc have employed analysis that, if

[1] One of the unsettling things about the Tenth Circuit Panel decision was its exclusive focus on the intent of Congress without considering the intent of the homesteader. In this case, specific evidence was introduced in the Trial Court and not rebutted by the government, showing that the people who homesteaded this ground did not consider sand, rock and gravel to be reserved by the mineral reservation of the patent. See, affidavits of Dee G. Atkin (App. 59a-62a), Ned Sullivan (App. 63a-65a), and Darrell Whitney (App.44a-58a), and the Declaration of Ray Schmutz (App. 66a-67a). Such arrogance is unbecoming a nation in which the citizens are the sovereign and the government is the servant of the people.

applied to the facts of this case, would have resulted in reversal of the trial court. In New West Materials, LLC v. Interior Bd. of Land Appeals, 216 Fed. Appx. 385 (4th Cir. 2007), for instance, the court was analyzing a patent issued in 1959 under the 1954 amendments to the Small Tract Act. The court first recognized the ambiguity in the word "mineral" alone. "[T]he word mineral is ambiguous, as it is 'used in so many senses, dependent upon the context.'" New West Materials, LLC v. Interior Bd. of Land Appeals, 398 F.Supp.2d 438, 445 (E.D.Va., 2005) (quoting Watt v. Western Nuclear, Inc., 462 U.S. 36, 42, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983)). The term is so broad that it could encompass virtually all of any conveyance of land. Western Nuclear, 462 U.S. at 43, 103 S.Ct. 2218.

Thus, the New West courts recognized the need to focus on "context." In that case, the context included a 1954 amendment to the Small Tract Act that added the word "all" to the phrase "all mineral deposits." Context in that case also included an analysis of the "contemporary legal sources understanding of the word mineral." New West, 398 F.Supp.2d at 445. In that regard the court considered the contemporary legal sources' understanding of the term mineral at the time of the STA's passage including contemporaneous judicial decisions, opinions of the Secretary of the Interior, and IBLA decisions which "bolstered the idea that the STA's mineral reservation included sand and gravel." New West, 216 Fed. Appx. at 390. Here it is important to note that the Patent in that case was

issued in 1959 under amendment to the STA that occurred in 1954, therefore the court was not faced with the issue that must be addressed in this case, i.e., whether the focus is on the intent of Congress solely, or whether that intent analysis should relate to the time of issuance of the particular patent and what was the intent of both Congress and the settler with regard to the land in question. All of the courts that have skirted this issue seem to have taken the anomalous view that there was only one party to a patent transaction—the U.S. Government. Such a view is an anachronistic interpretation of the homestead laws of this country. While a person in our generation may consider land patents issued based on improvement of the land and settling to be akin to a government give away, such was not the view in the last century when such legislation was enacted. There was great public virtue in having individuals brave the elements to settle theretofore barren lands, and neither the Congress nor the settlers considered the price paid by settlers to be insignificant. In that context it is both arrogant and intellectually unsettling for a court to base its intent analysis solely on what occurred in the halls of Congress at the time of the statute's passage and to ignore the facts on the ground at the time the patents were issued.

So if the word "valuable" used in the Pittman Act, but not in the SHRA, is not an adequate explanation for the distinction between Western Nuclear and BedRoc, what is the distinction? The answer is found in the differing facts of the two

cases. Indeed, the lawyer analyzing the Western Nuclear decision while talking to his or her BedRoc client could have predicted the outcome in BedRoc since the Western Nuclear holding, when applied to the BedRoc facts, pointed to only one conclusion. Sand, rock, and gravel of the type found by BedRoc Limited, LLC, in the Nevada desert was not considered a reserved mineral when the pioneers settled that ground, while the sand, rock, and gravel found in Wyoming by Western Nuclear, Inc., was considered a reserved mineral. In other words, it is the nature of the deposit, and the economic realities on the ground, rather than the statute under which the ground was patented, that determines whether sand, rock and gravel were considered a reserved mineral at the time the citizen homesteaded the ground. No other explanation satisfies the fact that five of nine justices read "minerals" and "valuable minerals" as having the same meaning.[2]

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[2] Indeed, it would make little sense for the Congress to reserve worthless substances from the patent. Actually, if one reviews the legislative history, it becomes apparent that the real concern of Congress was to prevent people from pretending to homestead in order to obtain known mineral deposits in bad faith:

> [I]f these minerals . . . are not disclosed on the surface of the ground, still the Government desires to prevent any fraud on the Government in the acquisition of this land under the guise of entering it for agricultural purposes, while at the same time it may be to acquire large bodies of coal or other valuable minerals that are apparently concealed under the surface, but are known to the entryman.

Similarly, the owners of the ground in this case should have been able to predict that because the facts of this case are distinguishable from the facts of Western Nuclear on the same material points that make the distinction of BedRoc and Western Nuclear intellectually defensible, they are entitled to a result similar to that in BedRoc rather than having their important and valuable real property rights emasculated through shallow comparison of the two statutes, especially when five of nine Supreme Court Justices have already weighed that distinction and found it wanting.

THE WORD "VALUABLE" IN THE PITTMAN ACT DOES NOT JUSTIFY THE BEDROC DEPARTURE FROM WESTERN NUCLEAR OR THE TENTH CIRCUIT DECISION IN THIS CASE.

Only four of the BedRoc justices thought the word "valuable" modified minerals sufficiently to distinguish BedRoc from the holding in Western Nuclear. See, BedRoc Ltd., v. United States, 541 U.S. 176 (2004). Five of the nine justices specifically held that the word "valuable" was not a sufficient distinction in the cases. See, App. 39a-43a.

Comments of Senator Pittman, 53 Cong. Rec. S705, S707 (1916). In this case, it is the government who is committing a fraud by trying to claim ownership to what was the surface of the ground that it was conveying, and substances for which there is no evidence to support a reservation intention at the time of conveyance.

FACTUAL DISTINCTIONS BETWEEN WESTERN NUCLEAR AND BEDROC JUSTIFY DISTINGUISHING THIS CASE AND SHOW THE TENTH CIRCUIT DECISION TO BE INADEQUATE.[3]

1. Type Of Soil: Gravel Deposit v. Sand And Gravel Interspersed In Soil.

Western Nuclear

This is the second criterion of the Western Nuclear test. Western Nuclear, 462 U.S. at 53 ("that can be removed from the soil").

"The deposit located on the property is an alluvial gravel with 6.4 acres of the 14 acre parcel mined for gravel. * * * There are 6-12 inches of overburden on the site * * *. It is estimated that the deposit thickness will average 10 feet or more in thickness. . . . [t]he gravel is overlain by a soil cover of fairly well developed loamy sand, some 12-18 inches in thickness, and [t]here is a relatively good vegetative cover, . . . " Id. at 40.

"Gravel in a valuable deposit is a mineral reserved to the United States." Id. at 40-41 (Emphasis added).

BedRoc

"Common sand and gravel were plentiful and visible on the surface of the Butlers' land." BedRoc, 541 U.S. at 180 (plurality opinion).

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[3] App. 39a-43a, summarizes the material factual distinctions between this case and Western Nuclear that require a different outcome from Western Nuclear.

"[C]ommon sand and gravel could not constitute a locatable 'valuable mineral deposit'. . . ." Id. at 185 (plurality opinion)(emphasis added).

The Present Case

"If the Government owned the sand, gravel and rock there would be nothing left for us to have owned, since the ground in that area is nothing but sand, gravel and rock." *Affidavit of Ned Sullivan at ¶ 9.* (App. 63a-65a).

"This property, like other property in the St. George area, is nothing but sand, gravel and rock. If these are removed there is no other surface estate." *Affidavit of Darrell Whitney ¶ 9.* (App. 44a-58a).

"The land in this area is nothing but rock, sand and gravel. If the Government reserved the rock, sand and gravel when it issued patents to the farmers who came here to homestead the land, then it committed a huge fraud since without rock, sand and gravel there is no surface estate. The land in this region is nothing but rock, sand and gravel." *Affidavit of Dee G. Atkin at ¶¶ 15-16.* (App. 59a-62a).

The courts, when interpreting other land grants from the same period that this patent was issued, have consistently determined that sand, gravel, and rock were not considered "minerals" for purposes of the reservations contained in period grants. See, e.g. Treasure Valley Concrete, Inc. v. State, 132 Idaho 673, 978 P. 2d 233 (1999) (land grant under 1925 Idaho statute reserving "all minerals of whatsoever kind or character," did not include sand, gravel and pumice because if it did

"then the grant of land would be nearly a fiction because of the breadth of the reservation").

The Tenth Circuit discussed this distinction but dismissed it as being inconsequential because "the Court devoted only a single line in its opinion to the removability issue." Sunrise Valley, LLC v. Kempthorne, 528 F.3d 1251 (10th Cir. 2008). It only takes a single line to conclude that an alluvial deposit is removable from the soil. What is important is that this was the second criterion of the Western Nuclear test to determine if the sand, rock, and gravel is a mineral or part of the homestead. One of the test criteria cannot be ignored because it is easily stated.

2. Commercial Market At Time Of Patent.

Western Nuclear

This is the third criterion of the Western Nuclear test. Western Nuclear, 462 U.S. at 53 ("That can be used for commercial purposes").

"What is significant is that gravel can be taken from the soil and used for commercial purposes." Id. at 55.

"A deposit is locatable if it is 'of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.'" Id. at 58, n. 18.

BedRoc

"Common sand and gravel were plentiful . . . but there was no commercial market for them due to Nevada's sparse population and the land's remote location." BedRoc, 541 U.S. at 180 (plurality opinion).

"Sand and Gravel were, and are, abundant throughout Nevada; they have no intrinsic value; and they were commercially worthless in 1919 due to Nevada's sparse population and lack of development. . . even the most enterprising settler could not have sold sand in the desert." Id. at 184 and n. 6.

The Present Case

"There is no evidence that anyone considered common rock, sand and gravel to be a separate estate in the land in 1925 when the patents under which the BLM is now claiming to own the rock, sand and gravel were issued." -*Affidavit of Dee G. Atkin at ¶ 19.* (App. 59a-62a).

"Before 1940, there is no way that anyone could have made a commercial enterprise out of selling sand and gravel in Washington County. Sand and gravel are plentiful in Washington County and was there for the taking. In fact, when I built my home in 1949 I needed some gravel and so I took what I needed from the Santa Clara River, which was a common practice." - *Declaration of Ray Schmutz at ¶¶ 3-4.* (App. 66a-67a).

The Tenth Circuit analyzed this fact and incorrectly determined that commercial viability today satisfies this third criterion of the Western Nuclear test. Sunrise Valley, LLC v. Kempthorne,

528 F.3d 1251 (10th Cir. 2008). In Western Nuclear, the Court did not go on to address when value must be determined - whether at the time of the conveyance or some indeterminate later time,[4] but the answer to the question is resolved in other cases. Even the Tenth Circuit recently found that commercial value at the time of the conveyance is determinative of whether sand and gravel were reserved as a "mineral" under a 1946 federal mineral reservation. See United States v. Hess, 348 F.3d 1237, 1248 (10th Cir. 2003). Because the sand and gravel at issue lacked commercial value when the patent was issued, the Tenth Circuit held they were not subject to the Government's mineral reservation. Id. The Hess case, which cited the 1956 Solicitor Opinion, stands for the position that the commercial value at the time of the conveyance is determinative of whether sand and gravel were reserved as a "mineral." The 1956 Solicitor Opinion was cited in Western Nuclear, BedRoc, and Hess. Only Hess was required to make a determination that the commercial value at the time of conveyance is

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[4] In its brief filed in BedRoc, the Solicitor General acknowledged that the Supreme Court did not resolve this issue in Western Nuclear:

> it is nevertheless true that Western Nuclear did not explicitly address the "site specific" [value-at-time-of-conveyance] argument that petitioner makes in this case.

BedRoc, Gov't Br., 2003 WL 23099240, at 34 (Dec. 19, 2003).

determinative of whether a "mineral" was conveyed, and of course it found that it was not. Other cases around the country that have been required to make that determination are, not surprisingly, consistent in holding that the focus must be on the time of the conveyance not later. See, City of Kellogg v. Mission Mountain Interests Ltd., Co., 16 P.3d 915, 919 (Idaho 2000); Red Hill Outing Club v. Hammond, 722 A.2d 501, 504 (N.H. 1998); Hare v. McClellan, 662 A.2d 1242, 1249-50 (Conn. 1995); Crockett v. McKenzie, 867 P.2d 463, 465 (Okla. 1994); Miller Land & Mineral Co. v. State Highway Comm'n of Wyo., 757 P.2d 1001, 1007 (Wyo. 1988)("value must be determined as of the time of the grant, reservation or exception")(Rooney, J., concurring); Herbert T. Tiffany, Real Property § 977 (3d ed. 1975).

Reference to the date of conveyance is in accord with the 1956 Opinion of the Interior Solicitor discussed above: In determining whether common materials are covered under a particular mineral reservation, the value of the materials is determined as of the "date of allotment or patent." Hess, 348 F.3d at 1249. The federal government, having once taken the position that real property rights are determined at the time of patent, cannot now be heard to argue that those rights, long established, can now be diminished because something that was not considered a mineral at the time of patent has become marketable. Real property rights do not come and go with the shifting economy. Poverty Flats Land & Cattle Co. v. United States, 788 F.2d 676, 683 (10th Cir. 1986)("New BLM views as to

mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions."). The question, therefore, is whether, as of the date of the patent, the sand and gravel possessed value "by reason of the existence and nearness of a market in which they can be sold at a profit." Hess, 348 F.3d at 1249.

The undisputed facts presented to the trial court and the Tenth Circuit in this case showed that at the time of patent, indeed until late into the 1950's, sand, gravel, and rock had no commercial purpose in Southern Utah. See, Declaration of Ray Schmutz, App. 66a-67a. Surely the fee simple title that the homesteader and his descendants received does not change as the economy shifts. Real property rights are not so chimerical. Congress and the purchasers of property could not easily have envisioned ownership interests shifting over time if ubiquitous but seemingly worthless materials later became marketable. Such an approach would violate another fundamental property law principle: an interest in property should be determinate and determinable. See, Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned . . . .").

Given the implausibility of the Tenth Circuit's intellectually flawed distinction of the BedRoc and Western Nuclear cases, this Court should grant this Petition for a Writ of Certiorari and the Western

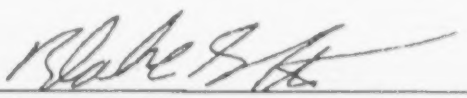
Nuclear holding should be applied to the facts of this case, the lower courts should be reversed and the case remanded with instructions to quiet title in Petitioners to the rock, sand, and gravel as it is found on Respondents' property, and as it was intended at the time Petitioner's predecessors in title were induced to settle the land.

CONCLUSION

For the above stated reasons, this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 16th day of October, 2008.

ATKIN LAW OFFICES, P.C.



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APPENDIX

United States District Court,
D. Utah, Central Division.

SUNRISE VALLEY, LLC, and Western Rock, a dba of Staker and Parson Companies, a Utah Corporation
Plaintiffs,
v.
Gale NORTON, Secretary of the Interior, Bureau of Land Management, and United States of America
Defendants.
No. 2:05CV00934.

June 21, 2006.

OPINION

BENSON, J.

INTRODUCTION

Defendants, Gale Norton, U.S. Secretary of the Interior, the U.S. Bureau of Land Management ("BLM"), and the United States, pursuant to Federal Rule of Civil Procedure 12(b)(6), move to dismiss Plaintiffs' Quiet Title Act ("QTA") claim. Plaintiffs, Sunrise Valley, LLC, and Western Rock, are owners of real property conveyed by a patent issued in 1925 by the United States under the Stock-Raising Homestead Act ("SRHA"). Plaintiffs' SRHA patent reserves "coal and all other minerals" to the United States. In their claim, Plaintiffs ask this Court to quiet title in their favor to all of the sand, gravel, and rock on their property. Defendants argue that the United States Supreme Court has specifically addressed and rejected the Plaintiffs' legal claim and

therefore Plaintiffs' entire action should be dismissed. The issue before the Court is whether sand, gravel, and rock found on Plaintiffs' lands qualify as minerals reserved to the United States pursuant to the SRHA.

BACKGROUND

On April 10, 1925, the United States conveyed a tract of land to Plaintiffs' predecessor-in-interest. Located in the semiarid desert of southern Utah, part of the land includes large quantities of sand, gravel, and rock. The land was conveyed by Patent No. 957390, issued pursuant to the SRHA. As required by the SRHA, the patent reserved to the United States "all the coal and other minerals" in the land.

In June 1974, Western Rock acquired title to a portion of the land covered by the 1925 patent and immediately began removing sand, gravel, and rock from the surface estate. Western Rock alleges that it continued to exercise ownership over the property by operating an open pit sand and gravel operation until 1999 when the United States first claimed an ownership interest in the sand, gravel, and rock on Western Rock's property.

Ned Sullivan, a lifetime farmer, also owned a portion of the property conveyed by the 1925 patent. In 2003, Mr. Sullivan sold a portion of this property to Sunrise Valley, LLC. When Sunrise Valley learned from the BLM that Sunrise Valley could not extract the rock, sand, and gravel on the property, Sunrise Valley brought this suit disputing the BLM's ownership claim over the rock, sand, and gravel on

its property.

DISCUSSION

In Watt v. Western Nuclear, 462 U.S. 36, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983), the U.S. Supreme Court unmistakably held that gravel constitutes a mineral reserved to the United States in SRHA-patented lands. In Western Nuclear, the defendant owned lands granted under an SRHA patent, which reserved to the United States "all the coal and other minerals" in the land. See id. at 39.The BLM ruled that the defendant committed unintentional trespass by removing 43,000 cubic yards of gravel from its SRHA-patented land. See id. at 40-41.The defendant contested the ruling, arguing that gravel was not included within the reservation of minerals to the United States under the SRHA. Id. The U.S. Supreme Court rejected the defendant's argument, holding that "gravel is a mineral reserved to the United States in lands patented under the SRHA," id. at 60, because gravel (1) is mineral in character; (2) can be removed from the soil; (3) can be used for commercial purposes; and (4) there is no reason to suppose gravel was intended to be included in the surface estate. Western Nuclear, 462 U.S. at 53-54. The Court explained that the congressional purpose of reserving mineral rights under the SRHA was "to facilitate the concurrent development of both surface and subsurface resources." Id. at 42.Because "ranching and farming do not ordinarily entail the extraction of mineral substances," id. at 54, and because Congress understood that surface lands were patented "chiefly ... for grazing and raising forage crops ... for the support of a family," id. at 38, the

Court found that it was best able to honor the congressional purpose of the SRHA by construing the mineral reservation to encompass gravel. Id. at 47.

This case is controlled by Watt v. Western Nuclear, 462 U.S. 36, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983). As in Western Nuclear, Plaintiffs acquired title to land covered by an SRHA patent, which reserved to the United States "all the coal and other minerals" in their land.

Notwithstanding the Supreme Court's ruling in Western Nuclear, Plaintiffs maintain that Congress did not intend to reserve the sand, gravel, and rock on their SRHA-patented land because: (1) Congress did not consider sand, gravel, and rock to be mineral in character when the Plaintiffs' patent was issued in 1925; (2) the sand, gravel, and rock on Plaintiffs' SRHA-patented lands, though technically removable from the soil, are so pervasive that they cannot be removed from the soil within the meaning of the SRHA; (3) sand, gravel, and rock could not be used for commercial purposes in 1925; and (4) sand, gravel, and rock were intended to be included in the surface estate conveyed by Congress under the SRHA patent.

The Court finds no support for Plaintiffs' argument. Plaintiffs' claim that Congress did not consider sand, gravel, and rock to be mineral in character in 1925 was addressed by the Supreme Court in Western Nuclear. The Court held that Congress considered gravel to be mineral in character when it passed the SRHA in 1916. Western Nuclear, 462 U.S. at 60. The Supreme Court's interpretation of minerals applies

to all SRHA patents, regardless of their date of issue. Plaintiffs' second claim that sand, gravel, and rock are so pervasive that they cannot be removed from soil is also refuted by Western Nuclear. The Court stated that its finding that minerals such as gravel can be removed from the soil "further[s] Congress' overriding objective of facilitating the concurrent development of surface and subsurface resources." Id. at 56. Additionally, Plaintiffs' assertion that sand, gravel, and rock cannot be used for commercial purposes is inconsistent with Western Nuclear, where the Court ruled that "gravel can be taken from the soil and used for commercial purposes." Id. at 55. Finally, Plaintiffs' assertion that sand, gravel, and rock were intended to be included in the surface estate conveyed by Congress under the SRHA was flatly and unmistakably rejected by the Western Nuclear Court. Id. at 55-56. ("Congress certainly could not have expected that homesteaders ... would have the interest in extracting deposits of gravel from SRHA lands[.]").

Plaintiffs argue that Western Nuclear is not applicable because it was essentially overruled by the concurring opinion in BedRoc Ltd., LLC v. United States, 541 U.S. 176, 187, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004). At issue in Bedroc was land patented under the Pittman Underground Water Act of 1919, a statute pertaining only to Nevada that reserved "all valuable minerals" to the United States on lands patented thereunder. Id. at 176.The Bedroc Court held that the reservation of minerals under the Pittman Act did not reserve sand and gravel to the United States since sand and gravel were not

"valuable mineral[s]."[1] On this basis, Plaintiffs argue that the continued viability of Western Nuclear is "highly questionable."

Plaintiffs' interpretation of Bedroc is misguided. Although the petitioners in Bedroc asked the Supreme Court to overrule Western Nuclear, the plurality refused this request, stating specifically that "we decline to overrule our recent [Western Nuclear] precedent." Bedroc, 541 U.S. at 183.In his concurrence, while Justice Thomas criticized the holding in Western Nuclear, he specifically declined to overrule Western Nuclear "[b]ecause the Government identifies significant reliance interests that would be upset" by doing so. Id. at 189.The dissent also refused to overrule Western Nuclear, stating that although "the majority in Western Nuclear may have misinterpreted Congress' intent," id. at 192, there does not exist adequate justification for disturbing a decision that has been settled law for two decades. Id. Thus, the Bedroc Court unanimously decided not to overrule Western Nuclear.

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[1]The plurality reached its holding without overturning Western Nuclear by distinguishing the text of the Pittman Act's mineral reservation from that of the SRHA. Specifically, it stated that the "SRHA's mineral reservation was identical to the Pittman Act's in every respect save one: Whereas the SRHA reserved to the United States 'all the coal and other minerals,' the Pittman Act reserved 'all the coal and other valuable minerals.' " BedRoc Ltd., LLC v. United States, 541 U.S. 176, 187, 124 S.Ct. 1587, 158 L.Ed.2d 338 (U.S.2004) (emphasis added). Because Congress "textually narrowed the scope of the term [minerals] by using the modifier 'valuable,' " id. at 182, the Court held that Congress "did not intend to include sand and gravel in the Pittman Act's mineral reservation." Id.

Based on the U.S. Supreme Court's rulings in Watt v. Western Nuclear, 462 U.S. 36, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983), and BedRoc, Inc. v. United States, 541 U.S. 176, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004), the Court grants Defendants' motion to dismiss.

CONCLUSION

For the reasons stated above, the court GRANTS Defendants' motion to dismiss. IT IS SO ORDERED.

Dated this 20th day of June, 2006.

FILED
United States Court of Appeal
Tenth Circuit
May 20, 2008
Elisabeth A. Shumaker
Clerk of Court

PUBLISH
United States Court of Appeals
Tenth Circuit

SUNRISE VALLEY, LLC; WESTERN ROCK PRODUCT, a Utah corporation dba STAKER AND PARSON,
Plaintiffs-Appellants,
v.
Dirk KEMPTHORNE,* in his capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 06-4188

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. No. 2:05-CV-934-DB)

Blake S. Atkin (with William O. Kimball, Brennan S. Moss on the briefs), Salt Lake City, Utah, for

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* Dirk Kempthorne has been appointed to serve as Secretary of the Interior and he is substituted as an appellee in the place of his predecessor, Gale Norton, pursuant to Fed. R. App. P. 43(c)(2).

Plaintiffs-Appellants.

Andrea L. Berlowe, U.S. Department of Justice (with Sue Ellen Wooldridge, Assistant Attorney General, William Lazarus, Elizabeth A. Peterson, U.S. Department of Justice), Washington, D.C., for Defendants-Appellees.

Before HENRY, Chief Judge, BRISCOE, and HOLMES, Circuit Judges.

HENRY, Chief Judge.

In this quiet title action brought pursuant to the federal Quiet Title Act, 28 U.S.C. § 2409a, plaintiffs-appellants Sunrise Valley, LLC and Western Rock Product (together, Western Rock), are appealing the order entered by the district court dismissing their amended complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Having considered the decisions of the United States Supreme Court in Watt v. Western Nuclear, Inc., 462 U.S. 36, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983) and BedRoc Ltd., v. United States, 541 U.S. 176, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004), we conclude that the district court correctly determined that the "sand, gravel, and rock" that is located on plaintiffs' real property are "minerals" reserved to the United States under the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291-302. Exercising jurisdiction under 28 U.S.C. § 1291, we therefore affirm.

I. FACTUAL BACKGROUND

In 1925, pursuant to the Stock-Raising Homestead

Act, Zera P.T. Hunt homesteaded the property in southern Utah located under U.S. Patent No. 957390, which underlies the property in question. The patent "except[ed] and reserv[ed] ... to the United States all the coal and other minerals in the lands so entered and patented together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the [Stock-Raising Homestead Act]." Aplts' App. at 37. Of the property at issue covered by Mr. Hunt's patent, Western Rock Product owns about 240 acres, and Sunrise Valley owns the balance.

"From 1974 to the present, the property owned by Western Rock has been operated by its owners as an open pit sand and gravel removal operation." Aplts' Opening Br. at 5. As the district court explained, "Western Rock ... continued to exercise ownership over the property by operating an open pit sand and gravel operation until 1999 when the United States first claimed an ownership interest in the sand, gravel, and rock on Western Rock's property." Aplts' App. at 7.

"In 2003, Sunrise Valley, LLC, began purchasing property [in the same part of southwestern Utah]," and it "began searching for available sand, gravel, and rock." Aplts' Opening Br. at 10. It subsequently "discovered a sand, gravel, and rock pit located ... on part of the property on which it had options." Id. According to Western Rock, however, Sunrise Valley has been unable to remove any sand, gravel, and rock from its property because the Bureau of Land Management "claims ownership" over those "common" materials. Id. at 11.

In its amended complaint, Western Rock requested that the district court quiet title in its favor to all of the sand, gravel, and rock that is located on its real property. Relying on the Supreme Court's decision in Watt v. Western Nuclear, Inc., 462 U.S. 36, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983), defendants filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), arguing that the United States owns the sand, gravel, and rock that is located on plaintiffs' property because those materials are "minerals" for purposes of the reservation of rights under the SRHA.

In determining that Western Rock failed to state a claim, the district court observed:

> In Watt v. Western Nuclear, 462 U.S. 36, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983), the U.S. Supreme Court unmistakably held that gravel constitutes a mineral reserved to the United States in SRHA-patented lands. In Western Nuclear, the defendant owned lands granted under an SRHA patent, which reserved to the United States "all the coal and other minerals" in the land. See, id. at 39, 103 S.Ct. 2218. The BLM ruled that the defendant committed unintentional trespass by removing 43,000 cubic yards of gravel from its SRHA-patented land. See, id. at 40-41, 103 S.Ct. 2218. The defendant contested the ruling, arguing that gravel was not included within the reservation of minerals to the United States under the SRHA. Id. The U.S. Supreme Court rejected the defendant's argument, holding that "gravel is a mineral reserved to the United States in lands patented under the SRHA," id. at 60, 103 S.Ct. 2218, because

gravel (1) is mineral in character; (2) can be removed from the soil; (3) can be used for commercial purposes; and (4) there is no reason to suppose gravel was intended to be included in the surface estate. Western Nuclear, 462 U.S. at 53-54, 103 S.Ct. 2218. The Court explained that the congressional purpose of reserving mineral rights under the SRHA was "to facilitate the concurrent development of both surface and subsurface resources." Id. at 42, 103 S.Ct. 2218. Because "ranching and farming do not ordinarily entail the extraction of mineral substances," id. at 54, 103 S.Ct. 2218, and because Congress understood that surface lands were patented "chiefly ... for grazing and raising forage crops ... for the support of a family," id. at 38, 103 S.Ct. 2218, the Court found that it was best able to honor the congressional purpose of the SRHA by construing the mineral reservation to encompass gravel. Id. at 47, 103 S.Ct. 2218.

This case is controlled by [Western Nuclear]. As in Western Nuclear, Plaintiffs acquired title to land covered by an SRHA patent, which reserved to the United States "all the coal and other minerals" in their land.

Aplts' App. at 7-8.

The district court also rejected plaintiffs' argument "that Western Nuclear is not applicable because it was essentially overruled by the concurring opinion in [BedRoc]." Id. at 9. As the court explained:

At issue in BedRoc was land patented under the

> Pittman Underground Water Act of 1919, a statute pertaining only to Nevada that reserved "all valuable minerals" to the United States on lands patented thereunder. Id. at 176, 124 S.Ct. 1587. The BedRoc Court held that the reservation of minerals under the Pittman Act did not reserve sand and gravel to the United States since sand and gravel were not "valuable mineral[s]." On this basis, Plaintiffs argue that the continued viability of Western Nuclear is "highly questionable."

Plaintiffs' interpretation of BedRoc is misguided. Although the petitioners in BedRoc asked the Supreme Court to overrule Western Nuclear, the plurality refused this request, stating specifically that "we decline to overrule our recent [Western Nuclear] precedent." BedRoc, 541 U.S. at 183, 124 S.Ct. 1587. In his concurrence, while Justice Thomas criticized the holding in Western Nuclear, he specifically declined to overrule Western Nuclear"[b]ecause the Government identifies significant reliance interests that would be upset" by doing so. Id. at 189, 124 S.Ct. 1587. The dissent also refused to overrule Western Nuclear, stating that although "the majority in Western Nuclear may have misinterpreted Congress' intent," id. at 192, 124 S.Ct. 1587, there does not exist adequate justification for disturbing a decision that has been settled law for two decades. Id. Thus, the BedRoc Court unanimously decided not to overrule Western Nuclear.

Aplts.App. at 9-10 (footnote omitted) (emphasis in original). The district court granted the motion to dismiss and Western Rock timely appealed.

II. DISCUSSION

Western Rock challenges the district court's decision, arguing that (1) the property's rock, sand, and gravel are not minerals under the Stock-Raising Homestead Act; (2) instead, the Court's decision in BedRoc Ltd., v. United States, 541 U.S. 176, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004), interpreting "valuable minerals" under another statute is applicable to this case, and would exclude rock, sand, and gravel from the government's mineral reservations; and (3) unlike in BedRoc, no intervening contract rights would be disturbed from such exclusion. For the reasons set forth below, we hold that BedRoc' s reach is not so expansive, and that, under Western Nuclear's undisturbed holding, the government's mineral reservations include rock, sand, and gravel, and that Western Rock's amended complaint is legally insufficient to state a claim for relief under the Quiet Title Act.

A. Standard of review

"Because the sufficiency of a complaint is a question of law, we review de novo the district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), applying the same standards as the district court." Moore v. Guthrie, 438 F.3d 1036, 1039 (10th Cir.2006). Those standards require that "we must accept as true all well-pleaded facts, and construe all reasonable allegations in the light most favorable to the plaintiff." United States v. Colo. Supreme Court, 87 F.3d 1161, 1164 (10th Cir.1996). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the

parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir.1999) (quotation omitted).

B. The Stock-Raising Homestead Act of 1916

All land patents issued by the United States under the Stock-Raising Homestead Act are subject to an express reservation of mineral rights in favor of the United States. The Stock-Raising Homestead Act, "the last of the great homestead acts, provided for the settlement of homesteads on lands the surface of which was 'chiefly valuable for grazing and raising crops' and 'not susceptible of irrigation from any known source of water supply.' " Western Nuclear, 462 U.S. at 37, 103 S.Ct. 2218 (quoting 43 U.S.C. § 292 (1976 ed.)). Congress's purpose was to bifurcate the surface and mineral rights to facilitate concurrent development. Id. at 50, 103 S.Ct. 2218. It would, thus, have made little sense to give minerals to stock raisers.

C. Western Rock's Arguments

Western Rock raises three interrelated arguments to support reversing the district court: (1) the property's rock, sand, and gravel are not minerals under the Stock-Raising Homestead Act; (2) the Court's decision in BedRoc is applicable to this case, which would exclude rock, sand, and gravel from the government's mineral reservations; and (3) that, unlike in BedRoc, no intervening contract rights would be disturbed from such exclusion. We examine

each argument in turn.

1. The Stock-Raising Homestead Act includes sand, gravel, and rock

First, Western Rock argues that, unlike in Western Nuclear, the sand, gravel, and rock on the relevant property is not found in a deposit that is "separable" from the surface estate. The Western Nuclear Court has already reversed this circuit on a similar issue, so we take extra precaution here.

As noted by the district court, the Supreme Court developed a four-part test in Western Nuclear to aid in the determination of what the Stock-Raising Homestead Act mineral reservation encompasses:

> we interpret the mineral reservation in the Act to include substances [a] that are mineral in character (i.e., that are inorganic), [b] that can be removed from the soil, [c] that can be used for commercial purposes, and [d] that there is no reason to suppose were intended to be included in the surface estate.

462 U.S. at 53, 103 S.Ct. 2218.

First, there is no debate that the rock, sand, and gravel at issue are inorganic substances and are minerals. Western Rock challenges the removability of the sand and gravel: "Where common sand and gravel are pervasive as in this case, it can hardly be considered removable from the soil." Aplts' Opening Br. at 24. While Western Rock is correct that the gravel deposit at issue in Western Nuclear "was an alluvial deposit covered with 12-18 inches of topsoil

overburden," id. at 24, 103 S.Ct. 2218; see also Western Nuclear, 462 U.S. at 40, 103 S.Ct. 2218, the physical characteristics of the deposit played no direct role in the Court's analysis in Western Nuclear. In fact, the Court devoted only a single line in its opinion to the removability issue. See Western Nuclear, 462 U.S. at 55, 103 S.Ct. 2218 ("What is significant is that gravel can be taken from the soil and used for commercial purposes."). Similarly, while the BedRoc plurality noted that the sand and gravel at issue in that case "were plentiful and visible on the surface of the ... land," BedRoc, 541 U.S. at 180, 124 S.Ct. 1587, the plurality did not rely on that fact to distinguish Western Nuclear. Consequently, because it is undisputed that the sand, gravel, and rock at issue in this case "can be taken from the soil and used for commercial purposes," Western Nuclear, 462 U.S. at 55, 103 S.Ct. 2218, we do not see any basis for distinguishing Western Nuclear.

Western Rock also challenges the commercial viability of sand, gravel, and rock at the time the Government made its mineral reservation. According to plaintiffs, this case should therefore be governed by BedRoc, not Western Nuclear. As plaintiffs explain in their opening brief:

> In this case, Landowners have demonstrated that gravel was not commercially viable in 1925 when the patent was issued. Because the subject property is in the same semiarid, undeveloped and sparsely populated desert area as the Nevada property at issue in BedRoc, the Court's conclusion that "sand and gravel were ... commercially worthless in 1919

> [to prospectors] due to Nevada's sparse population and lack of development" is facially applicable here. BedRoc, at 184, 124 S.Ct. 1587.

Aplts' Opening Br. at 25.

The Secretary of the Interior once took a similar view: "Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value ..., do not render the land in which they are found mineral in character within the meaning of the mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes." Zimmerman v. Brunson, 39 Pub. Lands Dec. 310, 310 (1910); see also BedRoc, 541 U.S. at 184 n. 6, 124 S.Ct. 1587 ("Indeed, as petitioners aptly point out, '[e]ven the most enterprising settler could not have sold sand in the desert.' ") (quoting Brief for Petitioners 6).

But, the Court in Western Nuclear wrestled with the identical argument, and rejected it:

> Respondent errs in relying on Zimmerman as evidence that Congress could not have intended the term "minerals" to encompass gravel. Although the legal understanding of a word prevailing at the time it is included in a statute is a relevant factor to consider in determining the meaning that the legislature ascribed to the word, we do not see how any inference can be drawn that the 64th Congress understood the term "minerals" to exclude gravel. It is most unlikely that many members of Congress

were aware of the ruling in Zimmerman, which was never tested in the courts and was not mentioned in the reports or debates on the SRHA. Even if Congress had been aware of Zimmerman, there would be no reason to conclude that it approved of the Secretary's ruling in that case rather than this Court's opinion in [Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526, 536, 23 S.Ct. 365, 47 L.Ed. 575 (1903)] which adopted a broad definition of the term "mineral" and quoted with approval a statement that gravel is a mineral. 462 U.S. at 45-46, 103 S.Ct. 2218 (internal citations omitted); see Soderberg, 188 U.S. at 536, 23 S.Ct. 365, 47 L.Ed. 575 (quoting with approval a statement in an English case that "everything except the mere surface which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire clay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land.") (quoting Midland Ry. Co. v. Checkley, (1867) L.R. 4 Eq. 19, 25 (Court of Chancery)).

We cannot agree that BedRoc is the applicable Supreme Court precedent. The BedRoc plurality looked back in time to 1919 in order to determine whether the sand and gravel at issue in that case were "valuable minerals" for purposes of the Pittman Act, which applied only to water development lands in Nevada. See 41 Stat. 293 (granting permit to "drill[ ] or otherwise explore for water beneath the surface of ... nonmineral, nontimbered public lands ... in the State of Nevada"); BedRoc, 541 U.S. at 183-84, 124 S.Ct. 1587. The BedRoc Court refused to

extend the rationale of Western Nuclear to the Pittman Act because the Court found that the Pittman Act's plain meaning would not support it. The Court emphasized Congress's addition of the modifier "valuable," in holding that sand and gravel were not "valuable minerals" reserved by the Pittman Act. Id. at 186-87, 124 S.Ct. 1587.

According to the plurality, this retrospective inquiry into the question of commercial value was required by the different statutory language in the Pittman Act, id., 124 S.Ct. 1587 and the plurality explicitly acknowledged that such an inquiry is not required under Western Nuclear's interpretation of the Stock-Raising Homestead Act, id. at 183 n. 5, 124 S.Ct. 1587 (noting that "Western Nuclear defined 'minerals' ... as substances ... that 'have separate value' from the soil," and that this definition involves only a "*minimal inquiry* into whether a substance *might at some point* have separate value from the soil and *might, in the abstract,* be susceptible of commercial use") (emphasis added). Consequently, even if the sand, gravel, and rock located on plaintiffs' property could not have been realistically used for commercial purposes in 1925, that fact is not determinative of our analysis under the Stock-Raising Homestead Act. Instead, for purposes of the Stock-Raising Homestead Act, we examine only whether the materials "might, in the abstract, be susceptible of commercial use," id., and we have no difficulty answering that inquiry in the affirmative. See New W. Materials LLC v. Interior Bd. of Land Appeals, 398 F.Supp.2d 438, 447 (E.D.Va.2005) (finding that the Small Tract Act of 1938, which contains identical wording as found in the Stock-

Raising Homestead Act, is governed by Western Nuclear, and that "mineral deposits" included sand and gravel), *aff'd,* 216 Fed.Appx. 385 (4th Cir.2007), *cert. denied,* ··· U.S. ····, 128 S.Ct. 863, 169 L.Ed.2d 723 (2008).

Finally, Western Rock wisely does not argue that sand, gravel, and rock were intended to be included in the surface estate. As in Western Nuclear,

> If we were to interpret the [Stock-Raising Homestead Act] to convey gravel deposits to the farmers and stockmen who made entries under the Act, we would in effect be saying that Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere. In resolving the ambiguity in the language of the [Act], we decline to construe that language so as to produce a result at odds with the purposes underlying the statute. Instead, we interpret the language of the statute in a way that will further Congress' overriding objective of facilitating the concurrent development of surface and subsurface resources.

462 U.S. at 56, 103 S.Ct. 2218. Although we expand our focus to include rock and sand here, the analysis is the same. There is no reason to suppose that rock, sand, and gravel were meant to be included in the surface estate (intended for livestock grazing), for that would hinder the concurrent development of surface and subsurface resources. See also New W. Materials, 398 F.Supp.2d at 449 ("Just as Congress would not have expected the ranchers and farmers

who received grants pursuant to the [Stock-Raising Homestead Act] to exploit the subsurface estate, Congress likewise could not have expected the homeowners or small business owners of five acre plots to exploit the subsurface estates sold or leased pursuant to the [Small Tract Act].").

2. Application of Supreme Court precedent

Western Rock's second argument, that the Supreme Court's reasoning in BedRoc applies to this case, is closely intertwined with the above analysis. As indicated, we agree with the district court that this case is controlled by Western Nuclear.

As the district court recognized, the BedRoc plurality held that Western Nuclear's expansive interpretation of the United States's mineral reservation under the Stock-Raising Homestead Act did not apply to cases arising under the Pittman Act given the materially different statutory language in the latter act. See BedRoc, 541 U.S. at 183-84, 124 S.Ct. 1587 (stating that Congress "textually narrowed" the scope of the term "minerals" in the Pittman Act by using the modifier "valuable," and that "the term 'valuable' makes clear that Congress did not intend to include sand and gravel in the Pittman Act's mineral reservation"). As explicitly set forth in the opinions of the BedRoc plurality, the concurrence, and the dissent, however, every member of the Court declined to overrule Western Nuclear. Id. at 183, 189, 191-92, 124 S.Ct. 1587.[1]

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[1] We acknowledge that Justice Thomas, concurring in the judgment, noted that he "believe[d] that mineral reservations

As a result, because this case is governed by the Stock-Raising Homestead Act, we are bound to apply the Court's decision in Western Nuclear, not BedRoc.

The government's mineral reservation in this case includes sand, gravel, and rock. Moreover, while plaintiffs have made a valiant attempt to distinguish Western Nuclear, their arguments essentially challenge the correctness of Western Nuclear's reasoning, and thus are better suited for a petition for certiorari.[2]

III. CONCLUSION

The judgment of the district court is AFFIRMED.

C.A.10 (Utah),2008.
Sunrise Valley, LLC v. Kempthorne
528 F.3d 1251

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pursuant to both the Pittman Act and the [Stock-Raising Homestead Act] do not include sand and gravel." 541 U.S. at 188, 124 S.Ct. 1587 (Thomas, J., concurring in the judgment). However, Justice Thomas felt constrained by the doctrine of stare decisis: "Although the Court in Western Nuclear incorrectly applied its definition of 'minerals' to include sand and gravel, the Court is typically reluctant to overrule decisions involving statute interpretation because 'stare decisis concerns are at their acme in cases involving property and contract rights.' " Id. at 189, 124 S.Ct. 1587 (quoting State Oil Co. v. Khan, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997)).

[2] But Western Rock argues that, if we apply BedRoc, we need not worry about disturbing any existing contract rights, because the only interested parties here are itself and the Government. Because we hold that Western Nuclear applies to our analysis, we need not address this argument.

FILED
United States Court of Appeal
Tenth Circuit
July 22, 2008
Elisabeth A. Shumaker
Clerk of Court

United States Court of Appeals
Tenth Circuit

SUNRISE VALLEY, LLC; et al.,
Plaintiffs-Appellants,
v.
Dirk KEMPTHORNE, in his capacity as Secretary of the Interior, et al.,
Defendants-Appellees.

No. 06-4188

ORDER

Before **HENRY**, Chief Judge **BRISCOE**, and **HOLMES**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

The Pittman Underground Water Act of 1919 ("Pittman Act"), Ch. 77, 41 Stat. 293.

CHAP. 77. - An Act To encourage the reclamation of certain arid lands in the State of Nevada, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to grant to any citizen of the United States, or to any association of such citizens, a permit, which shall give the exclusive right, for a period not exceeding two years, to drill or otherwise explore for water beneath the surface of not exceeding two thousand five hundred and sixty acres of unreserved, unappropriated, nonmineral, nontimbered public lands of the United States in the State of Nevada not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply: *Provided, however,* That not more than one such permit shall be issued to the same citizen or the same association of citizens within an area of forty miles square: *And provided further,* That said land shall not be fenced or otherwise exclusively used by the permittee except as herein provided: *And provided further,* That said land shall theretofore have been designated by the Secretary of the Interior as subject to disposal under the provisions of this act.

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate the lands subject to disposal under the provisions of this act: *Provided, however,* That where any person or association qualified to receive a

permit under the provisions of this act shall make application for such permit upon land which has not been designated as subject to disposal under the provisions of this act (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by this act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the land shall be designated under this act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal.

SEC. 3. That any qualified applicant for a permit under section 1 of this Act shall file with the register or receiver of the land district in which said land is located the application for such permit and shall make and subscribe before the proper officer and file with said register or receiver an affidavit that such application is honestly and in good faith made for the purpose of reclamation and cultivation and not for the benefit of any other person or corporation, and that the applicant is not acting as agent for any person, corporation, or syndicate in making such application, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land applied for or any part thereof, and that the applicant will faithfully and honestly endeavor to comply with all of the requirements of this Act, and shall pay to said register and receiver a

filing fee of 1 cent per acre for each acre of land embraced in said application, and such applicant shall then be entitled to receive such permit after the lands embraced therein are designated as provided in section 2 of this Act.

SEC. 4. That such a permit shall be upon condition that the permittee shall begin operations for the development of underground waters within six months from the date of the permit and continue such operations with reasonable diligence until water has been discovered in quantity hereinafter described, or until the date of the expiration of the permit. Upon the presentation at any time of proof satisfactory to the Secretary of the Interior that any permittee is not conducting such operations in good faith and with reasonable diligence, or has violated any of the terms of the permit, the Secretary shall forthwith cancel such permit, and such permittee shall not again be granted a permit under this Act.

SEC. 5. That on establishing at any time within two years from the date of the permit to the satisfaction of the Secretary of the Interior that underground waters in sufficient quantity to produce at a profit agricultural crops other than native grasses upon not less than twenty acres of land has been discovered and developed and rendered available for such use within the limits of the land embraced in any permit the said permittee shall be entitled to a patent for one-forth of the land embraced in the permit, such area to be selected by the permittee in compact form according to the legal subdivisions of the public land surveys if the land be surveyed, or to be surveyed at his expense under rules and regulations established by the Secretary of the Interior if located on unsurveyed land.

SEC. 6. That the remaining area within the limits of the land embraced in any such permit shall thereafter be subject to entry and disposal only under "An Act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, and amendments thereto, known as the one-hundred-and-sixty-acre homestead Act.

SEC. 7. That the receipts obtained from the sale of lands under the provisions of section 6 hereof shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress approved June 17, 1902, known as the Reclamation Act.

SEC. 8. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States, in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate, and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has

acquired from the United States the coal or other mineral deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entrymen or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situated, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the surface of the land.

SEC. 9. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things

necessary to carry out and accomplish the purposes of this Act.

Approved October 22, 1919.

The Stock-Raising Homestead Act of 1916 ("SRHA"), 43 U.S.C. §§ 291-302; Ch. 9, 39 Stat. 862.

CHAP. 9. – An Act To provide for stock-raising homesteads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this Act it shall be lawful for any person qualified to make entry under the homestead laws of the United States to make a stock-raising homestead entry for not exceeding six hundred and forty acres of unappropriated unreserved public land in reasonably compact form: *Provided, however,* That the land so entered shall theretofore have been designated by the Secretary of the Interior as "stock-raising lands."

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this Act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided,* That where any person qualified to make original or additional entry under the provisions of this Act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that the land applied for is of the character contemplated by

this Act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this Act, then such application shall be allowed; otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands.

SEC. 3. That any qualified homestead entryman may make entry under the homestead laws of lands so designated by the Secretary of the Interior, according to legal subdivisions, in areas not exceeding six hundred and forty acres, and in compact form so far as may be subject to the provisions of this Act, and secure title thereto by compliance with the terms of the homestead laws: *Provided*, That a former homestead entry of land of the character described in section two hereof shall not be a bar to the entry of a tract within a radius of twenty miles from such former entry under the provisions of this Act, subject to the requirements of law as to residence and improvements, which, together with the former entry, shall not exceed six hundred and forty acres: *Provided further*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land: *Provided further*, That instead of cultivation as required by the homestead laws, the entryman shall

be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than $1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

SEC. 4. That any homestead entryman of lands of the character herein described, who has not submitted final proof upon his existing entry, shall have the right to enter, subject to the provisions of this Act, such amount of contiguous lands designated for entry under the provisions of this Act as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to $1.25 for each acre thereof.

SEC. 5. That persons who have submitted final proof upon, or received patent for, lands of the character herein described under the homestead laws, and who own and reside upon the land so acquired, may, subject to the provisions of this Act, make additional entry for and obtain patent to contiguous lands designated for entry under the provisions of this Act, which, together with the area theretofore acquired under the homestead law, shall not exceed six hundred and forty acres, on proof of the expenditure required by this Act on account of permanent improvements upon the additional entry.

SEC. 6. That any person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, who has entered or acquired under the homestead laws, prior to the passage of this Act, lands of the character

described in this Act, the area of which is less than six hundred and forty acres, and who is unable to exercise the right of additional entry herein conferred because no lands subject to entry under this Act adjoin the tract so entered or acquired or lie within the twenty mile limit provided for in this Act, may, upon submitting proof that he resides upon and has not sold the land so entered or acquired and against which land there are no encumbrances, relinquish or reconvey to the United States the land so occupied, entered, or acquired, and in lieu thereof, within the same land-office district, may enter and acquire title to six hundred and forty acres of the land subject to entry under this Act, but must show compliance with all the provisions of this Act respecting the new entry and with all the provisions of existing homestead laws except as modified herein.

SEC. 7. That the commutation provisions of the homestead laws shall not apply to any entries made under this Act.

SEC. 8. That any homestead entrymen or patentees who shall be entitled to additional entry under this Act shall have, for ninety days after the designation of lands subject to entry under the provisions of this Act and contiguous to those entered or owned and occupied by him, the preferential right to make additional entry as provided in this Act: *Provided*, That where such lands contiguous to the lands of two or more entrymen or patentees entitled to additional entries under this section are not sufficient in area to enable such entrymen to secure by additional entry the maximum amounts to which they are entitled, the Secretary of the Interior is authorized to make an equitable division of the lands among the several entrymen or patentees, applying

to exercise preferential rights, such division to be in tracts of not less than forty acres, or other legal subdivision, and so made as to equalize as nearly as possible the area which such entrymen and patentees will acquire by adding the tracts embraced in additional entries to the lands originally held or owned by them: *Provided further*, That where but one such tract of vacant land may adjoin the lands of two or more entrymen or patentees entitled to exercise preferential right hereunder, the tract in question may be entered by the person who first submits to the local land office his application to exercise said preferential right.

SEC. 9. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has

acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided,* That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this Act.

SEC. 10. That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this

Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the Secretary may, in his discretion, also withdraw from entry lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock to summer and winter ranges or to shipping points, and may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands: *Provided further,* That such driveways shall not be of greater number or width than shall be clearly necessary for the purpose proposed and in no event shall be more than one mile in width for a driveway less than twenty miles in length, not more than two miles in width for driveways over twenty and not more than thirty-five miles in length and not over five miles in width for driveways over thirty-five miles in length: *Provided further,* That all stock so transported over such driveways shall be moved an average of not less than three miles per day for sheep and goats and an average of not less than six miles per day for cattle and horses.

SEC. 11. That the Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this Act for the purpose of carrying the same into effect.

Approved, December 29, 1916.

FACTUAL DISTINCTIONS BETWEEN WESTERN NUCLEAR, BEDROC, AND SUNRISE VALLEY

TYPE OF SOIL - Gravel Deposits v. Sand and Gravel Interspersed in Soil

WESTERN NUCLEAR:

--Second criterion of Western Nuclear test 462 U.S. at 53 (CAN BE REMOVED FROM THE SOIL)

--"The deposit located on the property is an alluvial gravel with 6.4 acres of the 14 acre parcel mined for gravel. ***There are 6-12 inches of overburden on the site***. It is estimated that the deposit thickness will average 10 feet or more in thickness... [t]he gravel is overlain by a soil cover of fairly well developed loamy sand, some 12-18 inches in thickness, and [t]here is a relatively good vegetative cover..." *462 U.S. at 40*

--"Gravel in a valuable deposit is a mineral reserved to the United States." *462 U.S. at 40-41 (emphasis added).*

BEDROC:

--"Common sand and gravel were plentiful and visible on the surface of the Butlers' land..." *541 U.S. at 180 (plurality opinion).*

--"[c]ommon sand and gravel could not constitute a locatable valuable mineral deposit..." *541 U.S. at 185 (plurality opinion).*

SUNRISE VALLEY:

--"If the Government owned the sand, gravel and rock there would be nothing left for us to

have owned, since the ground in that area is nothing but sand, gravel and rock." -*Affidavit of Ned Sullivan at ¶ 9.*

-"This property, like other property in the St. George area, is nothing but sand, gravel and rock. If these are removed there is no other surface estate." -*Affidavit of Daryl Whitney ¶ 9.*

--"The land in this area is nothing but rock, sand and gravel. If the Government reserved the rock, sand and gravel when it issued patents to the farmers who came here to homestead the land, then it committed a huge fraud since without rock, sand and gravel there is no surface estate. The land in this region is nothing but rock, sand and gravel." -*Affidavit of Dee G. Atkin at ¶¶ 15-16.*

COMMERCIAL MARKET AT TIME OF PATENT

WESTERN NUCLEAR:

--Third criterion of Western Nuclear test 462 U.S. at 53 (CAN BE USED FOR COMMERCIAL PURPOSES)

--"What is significant is that gravel can be taken from the soil and used for commercial purposes." *462 U.S. at 55*

--"A deposit is locatable if it is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *462 U.S. at 58 n. 18 (internal quotations omitted).*

BEDROC:

-- "Common sand and gravel were plentiful . . . but there was no commercial market for them due to Nevada's sparse population and the land's remote location." *541 U.S. at 180 (plurality opinion).*

--"Sand and Gravel were, and are, abundant throughout Nevada; they have no intrinsic value; and they were commercially worthless in 1919 due to Nevada's sparse population and lack of development. . . even the most enterprising settler could not have sold sand in the desert." *541 U.S. at 184 and n. 6.*

SUNRISE VALLEY:

-- "There is no evidence that anyone considered common rock, sand and gravel to be a separate estate in the land in 1925 when the patents under which the BLM is now claiming to own the rock, sand and gravel were issued." - *Affidavit of Dee G. Atkin at ¶ 19.*

--"Before 1940, there is no way that anyone could have made a commercial enterprise out of selling sand and gravel in Washington County. Sand and gravel are plentiful in Washington County and was there for the taking. In fact, when I built my home in 1949 I needed some gravel and so I took what I needed from the Santa Clara River, which was a common practice." - *Declaration of Ray Schmutz at ¶¶ 3-4.*

STATUTORY LANGUAGE IS NOT WHAT DISTINGUISHES BEDROC FROM WESTERN NUCLEAR.

WESTERN ROCK	BEDROC
The SHRA required patents to reserve "**minerals**."	The Pittman Act required patents to reserve "**valuable minerals**."

Only four justices, Chief Justice Rehnquist, joined by Justices O'Conner, Scalia, and Kennedy **relied on the use of the term "valuable"** in the text of the Pittman Act and its absence in the SRHA **to distinguish Western Nuclear**. BedRoc, 541 U.S. at 181-84.

Five of the BedRoc Justices
expressly found that the word "valuable"
in the text of the Pittman Act
did not distinguish *Bedroc* from *Western Nuclear*:

BEDROC CONCURRENCE	BEDROC DISSENT
--"[t]he mineral reservation provision in the [Pittman Act] cannot be meaningfully distinguished from the analogous provision of the Stock- Raising Homestead Act (SRHA)...The terms 'valuable minerals' and 'minerals' were intended to be synonymous." 541	-- "[T]he text of section 8 and its legislative history, as well as both the reasoning and the result in Western Nuclear, all support the conclusion that Congress intended the mineral reservation in these two statutes to be the same. The single word 'valuable,' in short,

U.S. at 187 (Concurring opinion). -- "I believe that mineral reservations pursuant to both the Pittman Act and the SRHA do not include sand and gravel." 541 U.S. at 188 (Concurring opinion).	cannot support the weight the Chief Justice places on it." 541 U.S. at 191 (Dissenting opinion)

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Telephone: (801) 533-0300

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Sunrise Valley, LLC, and Western Rock products, a dba of Staker and Parson Companies, a Utah Corporation,
Plaintiffs
vs.
Gale Norton, in her capacity as Secretary of the Interior, Bureau of Land Management, United States of America,
Defendants.

Affidavit of Darrell Whitney
Civil No. 2:05cv00934DB
Judge Dee Benson

Darrell Whitney having been first duly sworn deposes and says:

1. I am a vice president of Staker and Parson Companies, dba Western Rock Products ("Western Rock") one of the plaintiff's in this matter.

2. I have personal knowledge of the matters set forth herein.

3. Western Rock is the owner of approximately 240 acres located east of Washington City, in

Washington County, State of Utah. The property is used exclusively for the removal of aggregate (sand, gravel and rock). The property was purchased in 2002 in an asset purchase agreement from U.S. Aggregates Inc., the parent corporation of Western Rock Products Corporation.

4. On June 15, 1974 Western Rock Corporation bought its first parcel of property in the vicinity for the purpose of removal of aggregate. After that time it acquired the remaining parcels that make up the present holdings of Staker and Parson Companies. From 1974 to the present the property has been operated exclusively as a sand and gravel removal operation.

5. On February 5, 1999, I was contacted by the BLM who asked me to come to their offices.

6. I met with Larry gore, BLM geologist and Jim Crisp, BLM director who informed me that the BLM was the owner of the sand and gravel on our property. This was the first time I or anyone in the company had ever heard such a notion. Nothing in the real estate records suggests that the government owns any of the aggregate, and none of the people who own property in the area had any idea that the BLM was claiming ownership of common sand and gravel. Mr. Crisp gave me a copy of the BLM v. Western Nuclear case and suggested that I contact a lawyer. Over the next several years there were negotiations with the BLM over the claim that it owned the aggregate on the property. At one point I was even threatened with criminal prosecution.

7. No agreement was ever reached and on June 1, 2002, the property was purchased by Staker and Parson Companies.

8. At the time all of the properties were purchased by Western Rock, neither the sellers nor the buyer knew that the BLM claimed an interest in the aggregate on the property. Had we known that the BLM claimed ownership of the aggregate, we would not have paid the price we paid to the landowner, since there then would have been a question whether or not the landowner could deliver title to the aggregate.

9. In fact, this property, like other property in the St. George area is nothing but sand, gravel and rock. If these are removed there is no other surface estate.

10. Although all the property that we own traces its way back to patents under the May 20, 1862 Homestead Act, BLM only claims to own the sand and gravel in those parcels that were patented in 1925 under a reservation of "coal and other minerals." A copy of that Patent issued to Zara P.T. Hunt is attached hereto as exhibit "A." We own other land in the vicinity that traces its way to a patent issued under the 1862 Act in 1908. There was no reservation under the patent. That Patent was issued to James O. Wilkins is attached as exhibit "B." We own other land in the vicinity that traces its way to a patent issued under the 1862 Act in 1909. There was no reservation under that patent. That Patent issued to George Prince is attached as Exhibit "C". On November 14, 1950 the owner of that property, George Hall sold a parcel of the property in which it states "Specifically reserving unto grantor fifty percent of all oil and mineral rights in an to said lands" A copy of that deed to Stuart Allen is attached as exhibit "D."

11. In 1957 George Halls wife, Cuba Hall Lyle, sold the remainder of the property, and reserved "Gravel" in addition to the Oil and mineral rights with the following words. "There is excepted from all the above lands the mineral and oil rights which are retained by the grantor. It is specifically understood that the grantor retains the right to enter upon and remove any and all gravel found...without the necessity of compensating the grantee for damage to the surface of said lands." It was thus obvious in the minds of the property owners that "minerals" did not include "gravel" unless it was specifically spelled out. A copy of that deed to Stanley and Karma Sorensen is attached hereto as exhibit "E."

DATED this 2nd day of February, 2006

/s/ Darrell G. Whitney
Darrell Whitney

SUBSCRIBED and SWORN to before me this 2nd day of February 2006.

(seal)NOTARY PUBLIC
MYRNA MELDRUM
820 NORTH 1050 EAST
ST. GEORGE, UT 84770
MY COMM EXP. 08-12-06
STATE OF UTAH

/s/ Myrna Meldrum
Notary Public

EXHIBIT "A"

Salt Lake City.0202A2

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the register of the Land Office at Salt Lake City, Utah, has been deposited in the general Land Office whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain" and the acts supplemental thereto, including the Act of February 7, 1925, (Public No. 366), the claim of Zara P.T. Hunt has been established and duly consummated, in conformity to law, for the south half of Section seventeen and the Lots one and ten, the north half of the northeast quarter and the northeast quarter of the northwest quarter of Section twenty in Township forty-two south of Range fourteen west of the Salt Lake Meridian, Utah, containing four hundred ninety acres and thirty-nine hundredths of an acre, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described, TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be

recognized and acknowledged by the local customs, laws and decisions of courts and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving; however, to the United States all the coal and other minerals in the lands so entered and patented together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat., 862).

IN TESTIMONY WHEREOF, I, Calvin Coolidge, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the TENTH day of APRIL in the year of our Lord one thousand nine hundred and TWENTY-FIVE and of the independence of the United States the one hundred and FORTY-NINTH.

By the President: /s/ Calvin Coolidge
By /s/ Diola B. Pugh (?)*, Secretary
/s/ MP LeRoy (?)
Recorder of the General Land Office
RECORD OF PATENTS: Patent Number 957390

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* The photocopies of the Patents and Deeds attached to Darrell Whitney's affidavit are, in places, illegible. Because of this, a (?) has been placed in the text to indicate that what has been typed into this appendix represents a best approximation of what the Patent or Deed actually states. This explanation applies to all Exhibits to the Affidavit of Darrell Whitney.

EXHIBIT "B"

7729

(RECORD OF PATENTS)

THE UNITED STATES OF AMERICA
To all to whom these presents shall come, Greeting:

Homestead Certificate No. 8078.
Application 16051.

WHEREAS, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the Register of the Land Office at Salt Lake City, Utah, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the public Domain," and the acts supplemental thereto, the claim of James O. Wilkins has been established and duly consummated, in conformity to law, for the northwest quarter of the northwest quarter and the Lots two, three and four of Section twenty in Township forty-two south of Range fourteen west of the Salt Lake meridian, Utah, containing one hundred thirty and twenty-three-hundredths acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor General: NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said James O. Wilkins the tract of Land above described: TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof unto the said James O. Wilkins and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or

other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Theodore Roosevelt, President of the United States of America, have caused these letter to be made Patent, and the seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the city of Washington, the thirteenth day of August, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-third.

By the President: /s/ Theodore Roosevelt
By /s/ Young (?), Secretary
/s/ John O' (?)
Acting Recorder of the General Land Office

EXHIBIT "C"

85757

(RECORD OF PATENTS)

THE UNITED STATES OF AMERICA
To all to whom these presents shall come, Greeting:

Salt Lake City 02055
Homestead Certificate No.
Application

WHEREAS, There has been deposited in the GENERAL LAND OFFICE of the United States a Certificate of the Register of the Land Office at Salt Lake City, Utah, whereby it appears that, pursuant to the Act of Congress approved 20th May, 1862, "To secure Homesteads to Actual Settlers on the public Domain," and the acts supplemental thereto, the claim of George Prince has been established and duly consummated, in conformity to law, for the Lots eight and nine and the north half of the northwest quarter of Section nineteen in Township forty-two south of Range fourteen west of the Salt Lake meridian, Utah, containing one hundred forty-six and forty-nine-hundredths acres, according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor General: NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said George Prince the tract of Land above described: TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof unto the said George Prince and to his heirs and assigns forever; subject to any vested and accrued water rights for mining,

agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. taft, President of the United States of America, have caused these letter to be made Patent, and the seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the city of Washington, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

By the President: /s/ William H. Taft
By /s/ M.W. Young (?), Secretary
/s/ (?)
Recorder of the General Land Office

EXHIBIT "D"

WARRANTY DEED

George A. Hall Jr. and Cuba Hall, husband and wife Grantors, of City of Washington in the County of Washington, State of Utah, hereby convey and Warrant to Stewart S. Allen and Zella V. Allen, his wife, as joint tenants with full right of survivorship, and not as tenants in common. Grantee, of Leeds, in Washington County, State of Utah for the sum of Fourteen Thousand ($14,000.00) DOLLARS the following tract of land in under the Hall-Prince Ditch Washington County, State of Utah, to-wit:

All of Lot Eight (8) in Section 19 Township 42 South, Range 14 West, Salt Lake Base and Meridian containing 30.01 acres more or less. Also a part of Lot 9 in said Section 19 described as follows:- beginning at a point South 1320 feet and West 1000 feet from the Northeast Corner of said Section 19 and running thence South 300 feet; thence South 68(?) degrees and 33(?) minutes west 269.8 feet thence North 61 degrees 28(?) minutes West 67.6 feet; thence South 15 degrees 95(?) minutes East 986.9 feet; thence West 267 feet: thence North 1320 feet; thence East 320 feet to the place of beginning and containing 5.7 acres and being a part of Sectional Lot 9 of said section 19 as above described.

Also a part of the NW_4 of the NE_4 Said Section 19 Township 42 south, Range 14 West, S.L.M. and a small part of a sectional lot 1 of said Section 19 more particularly described as follows to-wit: Beginning at a point South 1320 feet and West 1501.8 f feet from the said Northeast Corner of Section 19 Township 42

South, Range 14 West, S.L.b(?). and M. and running thence West 1586.9 feet; thence North 335 feet; thence North 73 degrees 25 minutes East 720 feet; thence East 596.9 feet; thence South 540.5(?) feet to the place of beginning and containing 14.8(?) acres be the same more or less.

There is also conveyed with the above described property 40 shares or acres water right in the Hall-Prince Irrigation Ditch which conveys water from the Rio Virgin at a point opposite the St. George and Washington Canal Companies diversion.

Specifically reserving unto Grantor fifty percent of all oil and mineral rights in and to said lands.

the same.

SEAL

Orval Hafen

Notary Public

My commission expires February 13, 1938. Residing at St. George, Utah

I hereby certify the foregoing to be a full, true and correct copy of the original.

Filed for Record December 31, 1936 at 2 P.M.

/s/ Elma Woodbury Co. Recorder.

EXHIBIT "E"

WARRANTY DEED

CUBA HALL, now called CUBA HALL LYLE, Grantor, of Washington, Washington County, State of Utah, hereby conveys and Warrants to STANLEY N. SORENSON and KARMA S. SORENSON, husband and wife, as joint tenants and not as tenants in common but tenants with the full rights of survivorship, of Leeds, Washington County, State of Utah, for the sum of Forty-five Hundred ($4500.00) Dollars, the following tracts of land in Washington County, State of Utah, to-wit:

Parcel I: beginning at the Northeast Corner of section 19, Township 42 South, Range 14 West, Salt Lake Base and Meridian and running thence South 34.75 chains more or less to the North Bank of the Virgin River: thence Westerly along the said River Bank 1040 feet more or less to a point: thence North 15 degrees 05 minutes West 986.9 feet; thence South 61 degrees 20 minutes East 67.6 feet; thence North 68 degrees 38 minutes East 269.8 feet; thence North 300 feet; thence West 50[illegible].8 feet; thence North 540.4 feet; thence West 596.9 feet; thence South 73 degrees 25 minutes West 720.0 feet; thence South 335.0(?) feet to the North Bank of the Virgin River Bank; thence Northwesterly(?) along the said bank to the West Line of Lot 1, Section 19; thence North 10.0 chains more or less to the Northwest Corner of said Lot 1; thence East 60.0(?) chains to the place of beginning and containing 127.0 acres more or less.

Parcel II: ALSO, all of Lot 12, Section 19, containing 2.82 acres, in Township 42 South, Range 14 West, S.L.M.

Parcel III: ALSO, the West 30 rods(?) of the NW & SE(?) of Section 17, Township 42 South, Range 14 West, S.L.B.M. containing 15 acres more or less.

There is excepted from all the above lands the mineral and oil rights which are retained by the Grantor.

It is specifically understood that the Grantor also retains the right to enter upon and remove any and all gravel found in the NENE(?) and Lot 9 in Section 19 as above described, without the necessity of compensating the Grantee for damage to the surface of said lands.

Together with all improvements on each of said parcels of land above described and appurtenances and water rights thereunto belonging, or in any wise appertaining, specifically including but not limited to fifteen (15) shares of irrigation water right in what is known as the Prince and Wilkins Ditch, sometimes known as the Hall-Prince Ditch, which water right represents 15/110.6 of the combined decreed rights listed under Water Users Claims numbered 163 and 164 in the Virgin River Decree, and comprising 0.2740 cubic feet per second of water from the Virgin River to be diverted under the terms of said Decree, into the Prince and Wilkins Ditch at a point South 30°10"(?) East 908 feet from the West quarter corner of Section 21, Township 42 South, Range 14 West, Salt Lake Meridian, the said combined water right having been originally awarded to Zora(?) P. Hunt and George Prince. Together, also, with all ditches and ditch rights thereunto appurtenant.

WITNESS the hand of said grantor this 15 day of August, 1957.

/s/ Cuba Hall Lyle

SIGNED IN THE PRESENCE OF:

/s/ Kathryn Banks(?)

Notary Seal

Blake S. Atkin #4466
ATKIN LAW OFFICES, P.C.
136 South Main, Suite 401A
Salt Lake City, Utah 84101
Telephone: (801) 533-0300

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Sunrise Valley, LLC, and Western Rock products, a dba of Staker and Parson Companies, a Utah Corporation,
Plaintiffs
vs.
Gale Norton, in her capacity as Secretary of the Interior, Bureau of Land Management, United States of America,
Defendants.

Affidavit of Dee G. Atkin
Civil No. 2:05cv00934DB
Judge Dee Benson

Dee G. Atkin having been first duly sworn deposes and says:

1. I am the manager of Sunrise Valley, LLC one of the plaintiffs in this action.
2. In 2003, Sunrise Valley began purchasing property east of Washington City in Washington County.
3. As part of the construction activities that

Sunrise Valley is engaged in, I began searching for available rock, sand and gravel.

4. I noticed a rock, sand and gravel pit that is located in section 17 and began inquiring who the owner was.

5. I determined that the land was owned by the Sullivan family and I contacted Ned Sullivan.

6. Mr. Sullivan told me that the property had been sold on contract to Steed's, Inc. and they were the ones who had opened the gravel pit on the property.

7. I was able to determine that Steeds inc. had previously entered into a lease with the BLM to purchase rock, sand and gravel from the property which the BLM claimed it owned.

8. I contacted the BLM and tried to purchase the rock, sand and gravel underlying the property that the Sullivans had sold on contract to the Steeds.

9. I was informed by Jim Crisp of the BLM that I could not purchase the rock, sand and gravel without the permission of the owner of the surface.

10. Sunrise Valley then bought the reverter from the Sullivans because Steeds, Inc. was in default.

11. With that reverter, I again approached the BLM trying to purchase the rock, sand and gravel.

12. I was again told that because of the dispute between the Steeds and Sunrise Valley over the ownership of the surface, I could not purchase rock, sand and gravel from the land.

13. It was explained to me that the policies of the BLM do not permit removal of rock, sand and gravel that the BLM claims it owns, in property in southern Utah, without the permission of the surface owner.

14. Sunrise Valley owns approximately 300 acres on which the BLM claims to own the rock, sand and

gravel.

15. The land in this area is nothing but rock, sand and gravel.

16. If the government reserved the rock, sand and gravel when it issued patents to the farmers who came here to homestead the land, then it committed a huge fraud since without the rock, sand and gravel there is no surface estate. The land in this region is nothing but rock, sand and gravel.

17. I have researched the deeds for the land surrounding this property on which the BLM now claims to own the rock, sand and gravel.

18. It was not until 1957 that there was any attempt to recognize an estate in the rock, sand and gravel. Even then, when one wanted to reserve rights in the rock, sand and gravel it was done so expressly, not by a vague reference to "minerals."

19. There is no evidence that anyone considered common rock, sand and gravel to be a separate estate in the land in 1925 when the patents under which the BLM is now claiming to own the rock, sand and gravel were issued.

20. Neither Sunrise Valley nor I had any notice that the BLM was claiming to own the rock, sand and gravel in this property until 2004 after Sunrise had purchased the property and after I began making inquiries.

DATED this 1 day of February, 2006.

/s/ Dee G. Atkin
Dee G. Atkin

SUBSCRIBED and SWORN to before me this 1 day of February 2006.

/s/ Charlotte B. Carter
Notary Public

(seal)NOTARY PUBLIC
CHARLOTTE B CARTER
40 S 100 E
ST. GEORGE, UT 84770
MY COMM EXP 01-21-08
STATE OF UTAH

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Sunrise Valley, LLC, and Western Rock products, a dba of Staker and Parson Companies, a Utah Corporation,
Plaintiffs
vs.
Gale Norton, in her capacity as Secretary of the Interior, Bureau of Land Management, United States of America,
Defendants.

Affidavit of Ned Sullivan
Civil No. 2:05cv00934DB
Judge Dee Benson

Ned Sullivan having been first duly sworn deposes and says:

1. I have personal knowledge of the matters set forth herein.
2. I am 75 years old.
3. I am a farmer and have farmed the land around St. George all my life. My father before me farmed the land around St. George all his life.

4. Until 2003 my family owned certain land east of Washington City that we sold in that year to Sunrise Valley LLC.

5. The land had been purchased by my family in 1946.

6. Since its purchase until it was sold to Sunrise Valley my family farmed and ranched the ground.

7. Never during the time that we owned the property did anyone suggest that the Government owned the sand, gravel and rock on the property.

8. The original patent under which the property was homesteaded reserves only coal and other minerals to the United States, it does not reserve the sand, gravel and rock.

9. If the Government owned the sand, gravel and rock there would be nothing left for us to have owned, since the ground in that area is nothing but sand, gravel and rock.

DATED this 1 day of Feb, 2006.

/s/ Ned Sullivan
Ned Sullivan

SUBSCRIBED and SWORN to before me this 1 day of February 2006.

/s/ Charlotte B. Carter
Notary Public

(seal)NOTARY PUBLIC
CHARLOTTE B CARTER
40 S 100 E
ST. GEORGE, UT 84770
MY COMM EXP 01-21-08
STATE OF UTAH

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Plaintiffs
vs.
Gale Norton, in her capacity as Secretary of the Interior, Bureau of Land Management, United States of America,
Defendants.

Declaration of Ray Schmutz
In further opposition to defendant's motion to dismiss
Civil No. 2:05cv00934DB
Judge Dee Benson

Ray Schmutz under penalty of perjury declares as follows:

1. I was born in 1918, and have lived in Washington County, Utah all my life.

2. I am familiar with the local uses of Sand and Gravel in the Washington County Area.

3. Before 1940, there is no way that anyone could have made a commercial enterprise out of selling sand and Gravel in Washington County. Sand and Gravel are plentiful in Washington County, and was there for the taking.

4. In fact, when I built my home in 1949 I needed some gravel and so I took what I needed from the Santa Clara river which was a common practice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 5 day of April 2006

/s/ Ray S. Schmutz
Ray Schmutz